No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

DAMES & MOORE, a partnership,
Petitioner,

v.

DONALD T. REGAN, the Secretary
of the Treasury of the United States
of America, and THE UNITED STATES OF AMERICA,
Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE ATOMIC ENERGY ORGANIZATION OF
THE ISLAMIC REPUBLIC OF IRAN,
and
BANK MARKAZI IRAN,
Intervenor-Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit Before Judgment

REPLY BRIEF FOR INTERVENOR-RESPONDENT THE ISLAMIC REPUBLIC OF IRAN

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ARGUMENT

I. PETITIONER ADMITS THAT THE EXECUTIVE POSSESSES STATUTORY AUTHORITY TO BLOCK FOREIGN ASSETS, AND PETITIONER'S ATTEMPT TO EQUATE TRANSFER WITH VESTING MUST FAIL.

Petitioner contends that "ordering the transfer of [Iran's] property beyond the jurisdiction of United States courts . . . is wholly inconsistent with the purposes and legislative history of the [International Emergency Economic Powers Act] and is totally unprecedented either in peacetime or wartime." (Pet. Brief at 24). However, nothing in the legislative history of that Act supports petitioner's attempt to avoid the plain meaning of 50 U.S.C. §1702(a)(1)(B). Nor is the authority conferred by the Act limited to the specific form foreign claims settlement programs have taken in the past.

Petitioner bases its interpretation of the legislative history of the International Emergency Economic Powers Act, 50 U.S.C. §§1701-1706 (Supp. III 1979) (the "IEEPA"), upon the fact that the IEEPA does not contain the power to vest foreign assets contained in the Trading with The Enemy Act, 50 U.S.C. app. §§1-44 (1976 & Supp. III 1979). *Compare* 50 U.S.C. §1702(a)(1)(B) *with* 50 U.S.C. app. §5(b). According to petitioner:

> The fundamental distinction between the authority to freeze foreign assets which IEEPA preserved and the vesting power which IEEPA abolished has always been that a freeze, however uncertain its precise duration, results in a temporary and not permanent disposition of foreign property.

(Pet. Brief at 28). Petitioner contends that unblocking Iran's property and directing its transfer outside the United States effects a "permanent disposition" of that property which is "for all practical purposes a vesting order." (*Id.* at 28-29).

The attempt to equate any "permanent disposition" of blocked assets with vesting ignores the legislative history upon

which petitioner attempts to rely. Petitioner quotes the IEEPA House Report which states that Congress did not include in the IEEPA: "(1) the power to vest, *i.e.*, to take title to foreign property." H.R. Rep. No. 459, 95th Cong., 1st Sess. 15 (1977) (the "IEEPA House Report") (Pet. Brief at 26). Obviously, Congress did not define vesting to mean "permanent disposition" of foreign assets. (Pet. Brief at 28). Congress understood "vest" to mean "to take title to foreign property." IEEPA House Report at 15. Since Congress did not equate every "permanent disposition" of foreign assets with vesting, petitioner's reliance upon the absence of the power to vest in the IEEPA is misplaced.

Petitioner admits that the IEEPA does include the power "temporarily to freeze or block foreign assets." (Pet. Brief at 28). Petitioner further admits that

> the possible *unblocking* of billions of dollars of foreign assets previously frozen under a proper exercise of IEEPA authority is a powerful negotiating chip and has been used effectively in connection with settlements whereby, in exchange for an order unblocking assets, the foreign government has agreed to pay into a fund from which American claims would be paid.

(Pet. Brief at 32 n.31) (emphasis in original). In this respect the IEEPA House Report states: "Holding the assets of a foreign country is generally the most effective means of achieving settlement of U.S. claims." IEEPA House Report at 17. Nevertheless, petitioner would dictate the manner in which the Executive may regulate transfers of foreign assets once unblocked and thereby effectively destroy the Executive's negotiating ability to achieve peaceful resolutions of disputes with foreign states.

According to petitioner, the only means whereby the Executive can unblock foreign assets is "to allow [the] blocking controls to expire, leaving American creditors to whatever judicial remedies they may then have . . . . " (Pet. Brief at 32). If the Executive were required simply "to allow [the] blocking

controls to expire," then "the possible *unblocking* of . . . foreign assets . . . [would no longer be] a powerful negotiating chip . . . ." (Pet. Brief at 32 n.31) (emphasis in original). Under such circumstances it is difficult to see why "in exchange for an order unblocking assets, [a] foreign government [would] agree to pay into a fund from which American claims would be paid." (*Id.* at 32 n.31). Absent removal of outstanding attachments, the practical effect of unblocking would be that claimants could prevent the movement of a foreign state's property. In short, petitioner's position is contradictory to, and would frustrate, Congress' intention to permit the Executive in response to a national emergency to use control over foreign assets under United States jurisdiction in negotiations with a foreign state.

The Executive's action compelling transfer of Iran's property does not amount to the exercise of any greater or different authority than the blocking of that property, which petitioner admits was authorized by the IEEPA. (Pet. Brief at 28). Blocking Iran's property prevented the acquisition or transfer of any interest in the property, other than limited interests authorized under and subject to the blocking program. The *status quo* with respect to the property was frozen as of the time of blocking. On that date, November 14, 1979, Iran possessed full sovereignty and control over its property and petitioner had not attached that property. In ordering Iran's property transferred, the Executive has revoked licenses with respect to Iran's property acquired after November 14, 1979—licenses authorized under and subject to the blocking program.[1]

Petitioner's contention that it could alter the *status quo* during the freeze—and thereby acquire a benefit from the blocking program without accepting its restrictions—rests on the assertion that "the license here and its conditions are of no legal effect . . . . " (Pet. Brief at 29 n.29). Petitioner relies upon

[1] The Government of Iran reserves its position that the actions taken to implement the United States' interpretation of its obligations to Iran do not fully discharge those obligations.

Zittman v. McGrath, 341 U.S. 446 (1951) ("*Zittman I*"), in which the Alien Property Custodian sought to nullify attachments of blocked property and transfer possession of the property from the holder to the Custodian. The Court refused to nullify the attachments, but its holding allowed the Custodian to transfer the property notwithstanding the attachments: "[T]his result . . . in no way impairs control over alien property . . . ." 341 U.S. at 464. That the Custodian may direct the transfer of blocked property, notwithstanding attachments, was affirmed contemporaneously in *Zittman v. McGrath*, 341 U.S. 471 (1951) ("*Zittman II*").

In refusing to nullify the attachments in *Zittman I*, the Court relied heavily upon the Government's assertions in a related case that continuation of the attachments would not be objectionable, provided that the Court accepted the Government's "analysis of what the nature of any attachment action against a blocked account must be, in light of the purposes of freezing control . . . ." 341 U.S. at 456. The settlement program in *Zittman I* required claimants to litigate their claims before the Custodian could pay those claims. 341 U.S. at 457. The Government did not object to litigation by the claimants "to clarify their rights and liabilities," provided that there was no interference with the Government's control over the foreign assets. 341 U.S. at 456. Because such litigation depended upon *quasi-in-rem* jurisdiction, without the attachments claimants could not have obtained an adjudication of their claims satisfactory to the Custodian and the settlement scheme would have been "stalemated". 341 U.S. at 457. Thus, in *Zittman I* the attachments did not interfere with the transfer of the assets to the Custodian and furthered the settlement program. *Zittman I* lends no support to petitioner's attempt to block transfer of Iranian assets.

Petitioner's attempt to dictate the manner in which the Government can dispose of blocked assets is rejected directly by this Court's holding in *Orvis v. Brownell*, 345 U.S. 183 (1953), which petitioner attempts to distinguish. (Pet. Brief at 29 n.29). In *Orvis* the plaintiff sought to compel the Custodian to treat its claim under Section 9(a) of the TWEA, rather than

section 34. Section 34 of the TWEA provides for the settlement by the Custodian of claims of United States claimants against alien debtors, whereas section 9(a) permits persons claiming "any interest, right or title" in property held by the Custodian to recover that property or property interest directly from the Custodian. 345 U.S. at 184-85 n.1. Thus, section 9(a) permits assets to be removed from the common settlement fund, and section 34 provides for the settlement of claims from that fund. 345 U.S. at *id.* In *Orvis* the Court held that the freezing order prevented the subsequent acquisition of a lien which would constitute "any interest, right or title" according to section 9(a). 345 U.S. at 186, 188. The Court refused to permit the plaintiff to remove assets from the common fund under section 9(a) and consigned plaintiff's claim to the settlement program provided under section 34.

In both *Zittman I* and *Orvis,* the issue was the effect of a freeze program upon plaintiff's attachment rights.[2] In *Zittman I* the issue was whether the freezing order prevented the acquisition of such rights by attachment as would prevent the Custodian from transferring the assets. In *Orvis* the issue was whether the freezing order prevented the acquisition of such attachment rights[3] as would prevent the Custodian from distributing the assets according to the common settlement program.

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[2] In *Zittman I* the Court said: "The question is whether the attachment levies were 'transfers' forbidden by [the freezing order]." 341 U.S. at 449. In *Orvis* the Court said, "We are now called upon to decide . . . whether the freezing order prevented a creditor from thereafter acquiring by attachment an 'interest, right or title' in property such as will support a claim against the Custodian under §9(a) of the . . . [TWEA]". 345 U.S. at 186 (footnote omitted).

[3] Petitioner and The Marschalk Co., Inc. argue that their attachments constituted perfected, valid property rights under the state law of California and New York, respectively, which are not subject to executive interference and which entitle them to compensation. (Pet. Brief at 35; *Amicus* Brief at 12).

This argument overlooks the supremacy of the federal actions preventing the creation of interests in foreign assets. The IEEPA

(Footnote continued on following page)

Neither case turned on the act of vesting. Vesting was merely the particular settlement scheme adopted by the Government under the circumstances existing at that time. Nothing in either case requires the United States to effect claims settlements through domestic adjudication and a domestically administered fund, rather than through an international arbitration and escrow fund. Together the controlling cases establish that the blocking authority encompasses the power to transfer foreign assets and to dispose permanently of those assets, without interference from "post-freeze" attachments.

(Footnote continued from preceding page)

specifically authorizes the President to prohibit the "acquisition", "transfer", or "exercising any right" to foreign property. 50 U.S.C. §1702 (b) (1) (B). By regulation the Treasury Department prohibited the creation of any lien as a result of obtaining attachments. "Prohibited transfers" were defined to include the "creation . . . of any lien, the issuance, docketing, filing, or the levy of or under any judgment . . . attachment . . . or other judicial . . . process or order." 31 C.F.R. §535.310 (1980) (Iran App. 16a).

Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, the Treasury regulations are federal law supreme over state laws. In United States v. Belmont, 301 U.S. 324, 331 (1937), Justice Sutherland said:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies . . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. . . .

See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

Thus, to the extent California and New York law purported to create a lien by way of attachment, state law was superceded by federal law prohibiting the acquisition of liens against blocked property. Claimants obtained no valid property right pursuant to their attachments.

II. THE EXECUTIVE'S AUTHORITY TO SETTLE PETITIONER'S CLAIM, WITHOUT CONGRESSIONAL RATIFICATION, IS WITHIN THE CONSTITUTIONAL POWERS OF THE PRESIDENT.

The only question now remaining on this appeal concerning the validity of the settlement of petitioner's claim is whether the President alone can assert the power to settle the claim. The President's authority lies, under the most narrow possible interpretation, within the second category of presidential authority delineated by Justice Jackson and, broadly construed, within the first category.

> 1. When the President acts pursuant to an express or *implied* authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right, plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty . . . .
>
> 2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . .

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (emphasis added). The Government of Iran has pointed to the long history of executive claims settlement agreements negotiated by the President and the refusal of Congress to enact legislation restricting the President's authority to enter into such agreements. (Iran Brief at 16 n.20, 35-36). In the context of the IEEPA, Congress anticipated subsequent claims settlements, inasmuch as Con-

gress indicated that the withdrawal of certain TWEA powers effected by the IEEPA was not intended to impact the President's authority to settle claims of United States citizens. (*Id.* at 39 n.36). Further, Congress has taken no action with regard to this particular claims settlement agreement that could be construed as disapproval. (*Id.* at 39 n.37; *see id.* at 22-24). If Congress has approved this settlement, as the Government of Iran argues (*Id.* at 38-39), then the President's actions may be invalidated only if the federal government as a whole could not undertake such actions. Petitioner, *sub silentio,* has conceded that the federal government, acting as a whole, could settle petitioner's claim.[4] Thus, if the President's actions have been implicitly authorized by Congress, petitioner has conceded that settlement is valid.

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[4] *See* Pet. Brief at 19 (where Petitioner distinguishes United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 102 (1801), primarily on the ground that that settlement was effected by treaty), and at 23 (where Petitioner states that "Congress may confer that power . . . .").

Amici are in disarray as to whether the Executive has inherent authority to settle claims of United States nationals against foreign states. Four briefs acknowledge the authority. American Bell International Inc. "makes no assault on the President's authority to settle international claims between United States nationals and foreign states . . . ." (*Amicus* Motion at ii; Brief at 3-4, 11). The Marschalk Co., Inc. does not dispute the Executive's "limited" authority to settle expropriation and nationalization claims—but does dispute authority to settle claims based on commercial transactions occurring within the United States. (*Amicus* Brief at 5, 8 & nn.8 & 9). Petitioner's claim, for example, is based on a commercial transaction occurring in Iran. (App. to Brief of Intervenor-Respondent Atomic Energy Organization of Iran at A-25 to 35). Similarly, the Sperry Corporation *amici* distinguish prior claims settlements on the ground that they did not involve commercial claims. (*Amici* Brief at 14-15). Petitioner itself restricts its challenge to settlement of commercial claims. (Pet. Brief at 9-23). Finally, Sylvania Technical Systems Inc. "does not argue that the United States is powerless to enter into a settlement of foreign claims held by United States citizens." (*Amicus* Brief at 16-17).

Alternatively, if the Court is convinced that Congress has expressed neither disapproval or approval of this exercise of Executive branch authority, the authority challenged must be upheld as necessary to the discharge of the office of the President. (*Id.* at 35-36).

Petitioner has sought to demonstrate that Congress implicitly denied to the President the power to settle claims of United States citizens by enacting a statute that withdrew from the President the power to determine when a foreign state's sovereign immunity should be recognized. The Court is asked to apply Justice Jackson's third standard in *Youngstown*:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . .

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 637 (quoted in Pet. Brief at 16). If petitioner can persuade the Court that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1391(f), 1441(d), 1602-11 (1976) (the "FSIA") constitutes an implicit denial of the President's authority, petitioner contends that the President's actions conflict with petitioner's right of access to the courts and therefore must be struck down. Specifically, petitioner asserts that the President has no explicit power to define the jurisdiction of the lower federal courts and that, consequently, the President's actions which withdraw these claims from their jurisdiction should not be given effect. (Pet. Brief at 15-16).

This argument fails on the same underlying logical fallacy that permeates petitioner's entire argument: the false identification of the power to settle claims with the power to determine sovereign immunity. For example, petitioner describes earlier sovereign immunity determinations as the Executive's "use of private claims" (Pet. Brief at 20), but fails to recognize that, by suggesting sovereign immunity, the Executive did not so much "use the claims" as he "used the lawsuits." The claims survived.

In this case the President has settled petitioner's claim. The Executive by its action has not indicated any position or attempted to exert any authority with respect to the sovereign immunity of the Government of Iran. Although both powers have some effect on the continued viability of petitioner's lawsuit,[5] the two powers are distinct and should not be confused by the fact that Congress, in enacting the FSIA, provided the lower federal courts with jurisdiction to hear suits in which a sovereign was not entitled to immunity.

Petitioner's argument, if accepted, would have required courts prior to the FSIA's enactment to reject as an encroachment on their jurisdiction the Executive's determination of a foreign state's sovereign immunity. In those suits in which the Executive formerly made suggestions of immunity, relying on his inherent foreign policy authority (voluntarily relinquished when the Executive sponsored the FSIA), the courts otherwise would have held that subject matter and *in rem* jurisdiction existed.[6] The President's binding determination that a foreign entity was entitled to immunity limited the jurisdiction of the courts in the sense that the suit was required to be dismissed. But no court found that such a "limitation" was contrary to the dictates of the Constitution or that it arrogated to the President a power solely within the discretion of Congress.

The distinction between jurisdiction and questions of sovereign immunity, like the distinction between questions of sovereign immunity and the settlement of claims, was perceived by Congress. Before the FSIA, Congress had already given the

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[5] Even if petitioner's summary judgment is not vacated on the basis that its claim has been settled, the district court will be required to do so because the judgment was based on the erroneous legal conclusion that the Government of Iran had waived its immunity to suit.

[6] There would have been no need for the United States to file such a suggestion if a case were subject to dismissal.

lower federal courts diversity jurisdiction in actions involving foreign states. 28 U.S.C. §1332(a)(2),(3) (1976). By enacting section 1330, Congress did not intend to expand the grant of diversity jurisdiction, but rather sought to incorporate into that grant the sovereign immunity doctrine:

> Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. *Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.* The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a) . . . .

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6613 ("FSIA House Report") (emphasis added). Congress did not confuse the grant of diversity jurisdiction, which was already available, with the sovereign immunity doctrine. Rather, the grant of jurisdiction was refined to make clear that where immunity was to be accorded, the court should immediately dismiss the action without intervention of the Executive. At the Executive's request, Congress acted only to place before the judiciary a rule for decision for those occasions on which a foreign entity would not be entitled to immunity under 28 U.S.C. §1604:

> A principal purpose of this bill is to transfer *the determination of sovereign immunity* from the executive branch to the judicial branch, thereby reducing the foreign policy implications of *immunity* determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

FSIA House Report at 6606 (emphasis added) (quoted without emphasis in Pet. Brief at 10-11). Petitioner agreed:

"[T]he legislative history is replete with statements . . . emphasizing the . . . need to strip from the Executive the authority to terminate pending litigation *through invocation of the immunity doctrine.*" (Pet. Brief at 11) (emphasis added). The FSIA "deals *solely* with sovereign immunity." FSIA House Report at 6606 (emphasis added).

If the FSIA cannot be interpreted as a congressional comment on the President's practice of settling claims of United States citizens—and it cannot—the President's authority does not lie within the third category of presidential authority, as claimed by petitioner.[7]

Assuming that Congress has not addressed the authority of the President to settle petitioner's claim, petitioner argues that this action nonetheless constitutes an "abrogation of [petitioner's] statutory rights of access to the courts of this country . . . ." (Pet. Brief at 16), and an "intrusion into the very core of authority the Constitution confers on the other coordinate branches." (Pet. Brief at 21). However, to the extent that the Executive has "abrogated" any right of petitioner for which compensation must be paid, petitioner concedes that the President's actions cannot be invalidated because the question is not ripe for review. (Pet. Brief at 34 n.32).

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[7] Petitioner has cited no other expression of the will of Congress that could be construed as an implicit denial of the President's authority to settle petitioner's claim.

Similarly, it is unclear how the settlement of petitioner's claim can "intrude" into the authority of the other branches of government if Congress has acquiesced in such settlements and if the President has acted with respect to the claim and not with respect to the jurisdiction of the courts. The argument that such an "intrusion" must occur rests, again, on a failure to differentiate between claims settlement and sovereign immunity. Only if the President sought to determine the sovereign immunity of the Iranian defendants in the underlying action, a matter now explicitly reserved to the judiciary and, on that basis, sought to require dismissal of that action, could such an intrusion occur. This the President has not done.[8]

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[8] The fact that payment for petitioner's claim is to come from an award issued by the arbitral tribunal does not change the fact that petitioner's claim has been settled. When the President has negotiated lump-sum settlement agreements, the Foreign Claims Settlement Commission has made final determinations of the validity of claims and the specific amounts to be paid United States citizens from the lump-sum fund. Like the decisions of the Iran-United States Claims Tribunal, Claims Declaration, Art. IV, §1 (Pet. App. at 32), the decisions of the Commission were not subject to review by any other official, department, agency, or any establishment of the United States, or by any court by mandamus or otherwise. 50 U.S.C. app. §2010 (1976); 22 U.S.C. §1623(h) (1976). It is irrelevant that petitioner's claim must be presented to the Tribunal—the claim was settled on January 19, 1981, and no further proceedings in United States courts are warranted or appropriate.

CONCLUSION

Petitioner's attempts to restrict the Executive's authority to unblock frozen assets and to settle claims of United States nationals against foreign states are unavailing. The judgment below should be affirmed, in addition to the relief set forth in the Government of Iran's brief. (Iran Brief at 50).

Respectively submitted,

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I hereby certify that the foregoing Reply Brief for Intervenor-Respondent the Islamic Republic of Iran has been

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